2010-KA-00695-T

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Rachel Nelson, Appellant;
2. State of Mississippi;
3. Honorable Whitney M. Adams, Esq., Richland Municipal Prosecutor;
4. Honorable Victor W. Carmody, Jr., Esq., Trial Counsel for Appellant;
5. Honorable Kent McDaniel, County Court Judge for Rankin County;
6. Honorable Samac S. Richardson, Circuit Court Judge of Rankin County

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STATEMENT OF THE ISSUES

I. Whether the County Court of Rankin County improperly set aside a previously dismissed appeal (for a trial de novo) on a signed and filed Writ of Procedendo, thereby invading Appellant's due process rights?

II. Whether the double jeopardy protections are invoked when the State is improperly allowed to nolle prosequi a criminal charge, after an appeal for a trial de novo in the County Court is voluntarily dismissed by Appellant?

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

This case involves criminal charges brought by the City of Richland, Mississippi against Ms. Rachel D. Nelson, hereinafter referred to as Appellant. Appellant was charged with the crime of Driving Under the Influence, First Offense, by the City of Richland on or about October 27, 2006. She subsequently pleaded *nolo contendere* to the charge and was found guilty in the Municipal Court of Richland on November 15, 2006.

Appellant appealed the Municipal Court's verdict of guilty to the County Court of Rankin County. The appeal was set to be heard as a trial de novo in the County Court. Prior to the date of trial, Appellant moved the court to dismiss her appeal and remand the cause by writ of procedendo to the Municipal Court for imposition of sentencing. This motion was granted by the County Court.

Being aggrieved by this order, the State of Mississippi, through the City of Richland, hereinafter referred to as Appellee, moved the court to set aside the dismissal of the appeal and writ of procedendo remanding the cause to the Municipal Court. The County Court set Appellee's motion for a hearing, during which the County Court granted Appellee's aforementioned motion, as well as Appellee's motion to *nolle prosequi* the charge of Driving Under the Influence, First Offense, thereby ostensibly giving the State the ability to present the matter to a Rankin County grand jury in an attempt to indict Appellant for the felony charge of Driving Under the Influence (DUI) Mayhem, also known as Aggravated DUI. Appellant timely moved the County Court to reconsider its decision, and said motion was denied. Appellant, aggrieved by the disposition of the County Court, appealed to the Circuit Court of Rankin County pursuant to Uniform Rule of Circuit and County Court Practice 12.03. The Circuit Court

affirmed the County Court's ruling in an Order entered April 1, 2010. From that Order, Appellant now appeals to this Court, pursuant to the authority of Mississippi Code Section 11-51-81, and with the allowance of such appeal by a Justice of this Court. (R.E. at 6.)

B. Statement of Facts Relevant to the Issues

On or about October 27, 2006, Appellant was arrested and charged with Driving Under the Influence by the City of Richland, Mississippi. (R. at 12.) This arrest and charge stemmed from an automobile accident in which Appellant was allegedly involved, and in which injuries to others allegedly occurred. (R. at 17.) Appellant pleaded *nolo contendere* to Driving Under the Influence, First Offense, in the Municipal Court of Richland on November 15, 2006, and was found guilty by the Court of said charge. (R. at 13; R.E. at 7.)

Appellant filed and timely perfected a Notice of Appeal to the County Court of Rankin County pursuant to Uniform Rule of Circuit and County Court Practice 12.02. (R. at 6 – 9.) The Notice of Appeal was stamp as filed by the County Court on November 29, 2006. (R. at 6.) On January 4, 2007, the County Court set the trial date for April 2, 2007. (R. at 20.)

On March 27, 2007, Appellant filed a Motion to Dismiss Appeal with the County Court. (R. at 23; R.E. at 8.) The County Court granted the Motion to Dismiss Appeal and signed an Order to Dismiss and Order to Remand Back on Writ of Procedendo. (R. at 25; R.E. at 9.) The Appellee filed a Motion to Set Aside Order to Dismiss, to Reinstate Appeal and to Stay Proceeding on March 30, 2007. (R. at 26 – 30; R.E. at 10-14.) This motion was scheduled for a hearing in the County Court for April 12, 2007. (R. at 31 – 32.)

At the conclusion of the hearing on April 12, 2007, the County Court granted Appellee's motion to set aside the dismissal of the appeal, and also granted Appellee's motion to *nolle prosequi*, thereby ostensibly giving Appellee the ability to present the matter to a Rankin County Grand Jury in an attempt to indict Appellant for the felony charge of Driving Under the Influence (DUI) Mayhem. (T. at 43.) An "Order Setting Aside Order to Dismiss and Order to Remand Back on Writ of Procedendo, Reinstating Appeal, Denying the Issuance of a Stay on this Proceeding and Order Granting State's Motion to Nolle Prosequi" was subsequently entered by the County Court on April 13, 2007. (R. at 36 – 37; R.E. at 15-16.) Appellant's Motion for Reconsideration in the matter was denied by the County Court and an Order issued on April 23, 2007. (R. at 40.) Nelson's Notice of Appeal from the final order of the County Court – an appeal taken to the Circuit Court – was stamp-filed on April 27, 2007. (R. at 41.) The Circuit Court affirmed the County Court's ruling in an Order entered April 1, 2010. (R.E. at 4.) From that Order, Appellant now appeals to this Court, pursuant to the authority of Mississippi Code Section 11-51-81, and with the allowance of such appeal by a Justice of this Court. (R.E. at 6.)

SUMMARY OF THE ARGUMENT

I. The County Court erred when it set aside the dismissal Appellant's appeal for a trial de novo of her conviction in the Municipal Court of Richland. The County Court was without jurisdiction to hear the cause, having lost jurisdiction over the cause when the County Court previously dismissed Nelson's appeal and remanded the cause on a writ of procedendo to the Municipal Court for the execution of that court's previous judgment and sentence.

The final effect of the County Court's Order to Dismiss and Order to Remand Back on Writ of Procedendo deprived that court of all further jurisdiction of the matter. Mississippi law holds that a writ of procedendo remands a cause to the lower court where the imposition of the lower court's judgment and sentence is mandated upon the issuance of the writ. Therefore, the County Court was without jurisdiction to set aside the dismissal of Appellant's appeal for trial de novo. Such action violated Appellant's due process right to voluntarily dismiss her appeal for trial de novo and to accept the previous judgment and serve the sentence of the Municipal Court for DUI First Offense.

Further, the Order of the County Court of Rankin County, Mississippi which granted the Appellee's motion to set aside the dismissal of Appellant's appeal for trial de novo, and the Appellee's motion to nolle prosequi, was erroneous since an appellant has a right to voluntarily dismiss an appeal in such a situation.

The Uniform Rules of Circuit and County Court Practice (hereinafter "URCCC") are silent on whether an appellant may voluntarily dismiss his or her appeal from the county or circuit court. The case law in Mississippi on this issue has been misconstrued since the state Supreme Court handed down its ruling in *Bang v. State*, 106 Miss. 824, 64 So. 734 (Miss. 1914), which held that one who appeals from a justice of the peace to a circuit court, which requires a

trial de novo, cannot dismiss his appeal *after* the evidence of the state has been introduced in the circuit court. (Emphasis added). Authorities from our sister states offer logical guidance to the interpretation of an appellant's clear right to dismiss his or her appeal before a trial de novo is held. For these reasons, Appellant had a lawful right to dismiss her appeal in the County Court, even without the consent of the Appellee, and the County Court's setting aside of such dismissal constitutes reversible error.

II. The actions of the County Court described in subsection (I) above invokes the constitutional protection against double jeopardy as guaranteed by the state and federal constitutions. Uniform Rule of Circuit and County Court Practice 12.02(C) provides that, "[u]pon the filing with the circuit clerk of the notice of appeal and bonds or cash deposits as required by this rule . . . the prior judgment of conviction shall be stayed." As such, the prior judgment of conviction is not set aside, reversed, or overturned. It is merely stayed until such time as the trial de novo is heard, or an appellant dismisses his or her appeal to accept the prior judgment of conviction. Since the County Court erroneously allowed the Appellee to nolle prosequi the misdemeanor DUI First Offense charge, Appellant's prior judgment of conviction should properly constitute a conviction for purposes of double jeopardy, and the State is constitutionally barred from pursuing an indictment by a grand jury for DUI Mayhem in the instant case.

ARGUMENT

I. The County Court of Rankin County improperly set aside a previously dismissed appeal (for a trial de novo) on a signed and filed Writ of Procedendo, thereby invading Appellant's due process rights?

Jurisdictional issues may be raised at any time, even on appeal. *Gale v. Thomas*, 759 So. 2d 1150, 1159 (Miss. 1999). In this case, the final effect of the County Court's Order to Dismiss and Order to Remand Back on Writ of Procedendo deprived that court of all further jurisdiction of the matter. (R. at 25; R.E. at 26.) The appellant in the matter *sub judice* finds no Mississippi authorities which affirmatively state that the superior court which issues a writ of procedendo loses jurisdiction. However, by definition, a writ of procedendo orders the lower court to proceed to the judgment that the lower court rendered.

In Mississippi, a writ of procedendo is issued by a superior court to an inferior court in order to enforce the lower court's judgment. *Ferrell v. State*, 785 So. 2d 317 (Miss. App. 2001) (citing *Pool v. State*, 176 Miss. 514, 515, 169 So. 886, 887 (Miss. 1936)). The Supreme Court of Mississippi has also held that an order dismissing an appeal on a writ of procedendo is equivalent to pleading guilty and accepting the justice court's sentence. *Lee v. State*, 357 So. 2d 111, 113 (Miss. 1978). Thus, Mississippi's position on the effect of a writ of procedendo is that the superior court deprives itself of any further jurisdiction over the cause once the writ is issued. For these reasons, in the case *sub judice* the County Court deprived itself of any and all jurisdiction once it remanded this matter on writ of procedendo on March 27, 2007. (R. at 25; R.E. at 26.) Therefore, the County Court was without jurisdiction to set aside the dismissal of Nelson's appeal.

Mississippi law allows one who has been found guilty of a crime in a justice or municipal court to appeal the judgment to county court, or if there is no county court, then to the circuit court. Uniform Rule of Circuit and County Court Practice 12.02(A). URCCC 12.02(C) states that "[t]he appeal shall be a trial de novo." The URCCC is silent on whether an appellant may voluntarily dismiss his or her appeal from the county or circuit court. However, in *Bang v. State*, the Supreme Court of Mississippi held that one who appeals from a justice of the peace to a circuit court, which requires a trial de novo, cannot dismiss his appeal *after* the evidence of the state has been introduced in the circuit court. *Bang*, 106 Miss. 824, 64 So. 734 (Miss. 1914) (emphasis added).

The facts of *Bang* are relatively simple. In that case, the appellant had been convicted of illegally selling liquor by a Justice of the Peace. *Id.* at 735. On appeal to the circuit court, the matter proceeded to trial where the State presented its case with evidence and testimony. *Id.* After the State had introduced its evidence and rested, the appellant then made a motion to dismiss his appeal. *Id.* The appellant's motion was overruled, and the Supreme Court affirmed this ruling. *Id.*

After research, Appellant's counsel in the instant case has found that *Bang* has been cited in three (3) subsequent opinions handed down by the Supreme Court of Mississippi. *Thigpen v. State*, 206 Miss. 87, 39 So. 2d 768 (Miss. 1949); *Peeples v. State*, 216 Miss. 790, 63 So. 2d 236 (Miss. 1953); *Parham v. State*, 229 So. 2d 582 (Miss. 1969). The appellant in the matter *sub judice* finds no other Supreme Court decisions which cite *Bang*, and the appellant does not find any opinions at all rendered by the Court of Appeals which have cited *Bang*.

In *Thigpen*, the Court was faced with another set of facts involving the unlawful sale of intoxicating liquors. *Thigpen*, 206 Miss. 87 at 90, 39 So. 2d 768 (Miss. 1949). The appellant was found guilty by a Justice of the Peace and thereafter appealed his conviction to the Circuit

Court of Jasper County. *Id.* On the day of the trial in the Circuit Court, the appellant first moved for a continuance, which was denied, and then moved "to dismiss the appeal with a writ of procedendo and this motion was also overruled by the Court." *Id.* at 769. The Supreme Court affirmed, and on the issue of whether the Circuit Court erroneously overruled the appellant's motion to dismiss his appeal with procedendo, the Court held that there was no error. *Id.* The reasoning from *Thigpen* is stated as follows:

> This question has been set at rest in this State by the decision in Bang v. State, 106 Miss. 824, 64 So. 734. It was there decided that one appealing a conviction from the Justice of the Peace court to the Circuit Court stands there for trial de novo as defendant and he occupies in that court the same attitude of a defendant as he did in the court of the Justice of the Peace and as such is impotent to dismiss the case. He had no more right to dismiss the appeal in the Circuit Court than he had to enter a nolle prosequi in the court of the justice of the Peace. No defendant charged with a crime for the commission of which he is upon trial has a right to dismiss the case from the docket. He was on trial for the crime charged against him. His case was being disposed of as other and like cases in that court. The lower court was correct in overruling the motion to dismiss the appeal with procedendo.

Id. at 769-70.

Thigpen is distinguishable from the case *sub judice* for two reasons. First, Thigpen was in court for trial when he made his motion to dismiss the appeal with a writ of procedendo. *Id.* at 769. Appellant's case had been set for trial, but the motion to dismiss her appeal and remand to the Municipal Court of Richland was made in advance of the actual trial date. (R. at 23; R.E. at 24.)

The second reason *Thigpen* is of no help in the instant matter is that in citing *Bang*, the *Thigpen* Court overlooked the relevant facts of *Bang*. The Court's holding in *Bang* hinged on the fact that Bang had waited until the State presented its case with witnesses and evidence at trial before moving to dismiss his appeal. *Bang*, 64 So. 734 at 735 (Miss. 1914). Thus, it appears

that the *Thigpen* Court based it's reliance on *Bang* solely on *Bang's* conclusion without examining the relevant facts and rationale of *Bang*. *Thigpen*, 39 So. 2d 768 at 769-70 (Miss. 1949).

The opinion of *Peeples v. State* cited *Bang* (as well as *Thigpen*) in a brief statement wherein it simply held that there was no merit in the appellant's argument that the circuit court erroneously denied his motion to dismiss his appeal from the justice court. *Peeples*, 216 Miss. 790 at 801, 63 So. 2d 236 at 239-40 (Miss. 1953). In *Peeples*, like *Thigpen*, the appellant made "his motion at the beginning of the trial in the circuit court . . . ." *Id.* at 239. There is no discussion of the rationale or reasoning of this conclusion in *Peeples* as the court only included citations to *Bang* and *Thigpen* without any comment on either opinion. *Id.* at 240. Again, Appellant's motion to dismiss her appeal and remand to the Municipal Court of Richland was filed with the County Court prior to the trial. (R. at 23; R.E. at 24.)

In *Parham v. State*, the Supreme Court was once again faced with a situation in which the appellant had been convicted of a criminal offense by a Justice of the Peace, then appealed that conviction to the Circuit Court for a trial de novo. *Parham v. State*, 229 So. 2d 582 (Miss. 1969). On the *day of trial*, after being denied a motion for continuance, "[t]he appellant then requested the court to dismiss his appeal and to return it to the Justice of the Peace Court by a writ of procedendo." *Id.* at 583 (Emphasis added). The appellant in Parham was overruled, and he was convicted in the trial de novo. On appeal, the court affirmed on this issue and its basis for this doing so simply repeated the reasoning from *Thigpen*, discussed above. *Id.* at 584.

Examining the law of other jurisdictions, the Supreme Court of Oklahoma has held that a party may dismiss an appeal from a judgment of a justice of the peace court to the county court *at any time before the commencement of the trial* in which the appeal is perfected and this may be done without the consent of the other party. *O'Rourke v. O'Rourke*, 142 Okla. 238, 286 P.

341 at 343 (1930) (emphasis added). Further, the O'Rourke court held that *an appellate court errs if it refuses to permit a party to dismiss his or her appeal when a timely motion is made. Id.* (emphasis added). In the case *sub judice*, Appellant's appeal was dismissed "before the commencement of the trial in the court to which the appeal is perfected" and "without the consent of the other party." Similarly, the Supreme Court of Wyoming held in *Mayott v. Knott* that an order dismissing an appeal from a justice court may be made by motion of one of the parties and this order waives the appellant's right to a trial de novo. *Mayott*, 16 Wyo. 108, 92 P. 240 at 241 (1907). In the case *sub judice*, there was in fact a signed Order from the County Court which dismissed Nelson's appeal and remanded to the Municipal Court on Writ of Procedendo. (R. at 25.)

The County Court's erroneous ruling in retaking jurisdiction and allowing Appellant's appeal for trial de novo in that court to be reinstated has deprived Appellant of the right to fundamental fairness as guaranteed by the due process clause of the Fourteenth Amendment of the United States Constitution.[1] As demonstrated by the case law cited above, Appellant had a clear right to voluntarily dismiss her appeal for trial de novo.

II. The double jeopardy protections are invoked when the State is improperly allowed to nolle prosequi a criminal charge, after an appeal for a trial de novo in the County Court is voluntarily dismissed by Appellant?

The ruling of the County Court described in subsection (I) above invokes the constitutional protection against double jeopardy as guaranteed by the state and federal

[1] "Essentially, fundamental fairness is what due process means." *Pederson v. South Williamsport Area School Dist.*, 677 F.2d 312, 317 (3rd Cir. 1982), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

constitutions.[2] Uniform Rule of Circuit and County Court Practice 12.02(C) provides that, "[u]pon the filing with the circuit clerk of the notice of appeal and bonds or cash deposits as required by this rule . . . the prior judgment of conviction shall be stayed." Black's Law Dictionary defines "stay," as "**1.** [t]he postponement or halting of a proceeding, judgment, or the like. **2.** An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding." *Black's Law Dictionary* (Bryan A. Garner ed., Abridged 7th ed., West 2000). As such, the prior judgment of conviction is not fully set aside, reversed, or overturned. It is merely stayed until such time as the trial de novo is heard, or an appellant dismisses his or her appeal to accept the prior judgment of conviction.

Since the County Court erroneously allowed the Appellee to nolle prosequi the misdemeanor DUI First Offense charge, Appellant's prior judgment of conviction should properly constitute a conviction for purposes of double jeopardy, and the State is constitutionally barred from pursuing an indictment by a grand jury for DUI Mayhem in the instant case.

[2] Miss. Const. Art. 3, § 22, and U.S. Const. amend. V, respectively.

CONCLUSION

For the above and foregoing reasons, the Appellant respectfully requests that this Court reverse and render the "ORDER AFFIRMING JUDGMENT" of the Circuit Court of Rankin County. Pursuant to Mississippi Rule of Appellate Procedure 34(b), oral argument is requested in this case because it presents an issue of first impression, or at least of rare impression, in the courts of this state.

Respectfully submitted,

RACHEL D. NELSON, the APPELLANT

By: _____

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CERTIFICATE OF SERVICE

I, Lance O. Mixon, counsel for the Appellant, Rachel D. Nelson, do hereby certify that I have this day delivered a true and correct copy of the above, foregoing document in a manner prescribed by law to:

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Circuit Court Judge of Rankin County
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Brandon, Mississippi 39043

Honorable Kent McDaniel
County Court Judge of Rankin County
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Honorable Jim Hood
Mississippi Attorney General
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Honorable Whitney M. Adams
Richland Municipal Prosecutor
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Pearl, Mississippi 39208

This service effective this the 4th day of October, 2010.

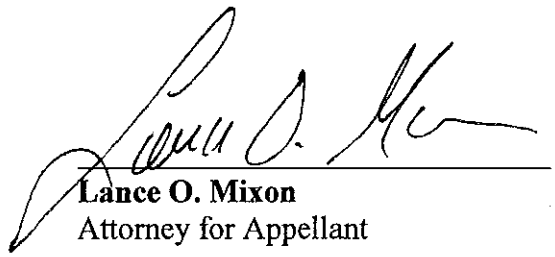
( ) Handing same to said attorney(s).

( ) Delivering same to the office of said attorney(s).

(✓) Depositing a copy thereof in the United States Mail, postage prepaid and addressed as indicated above.

( ) Depositing a copy thereof in the United States Mail, certified, return receipt, restricted delivery, address correction requested, postage prepaid and addressed as indicated above.

( ) Faxing as well as mailing.



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